SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

—v.—

70-47

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT FLORENCE DIFFENDERFER

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IN THE

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FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

—v.—

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT FLORENCE DIFFENDERFER

Opinion Below

The opinion of the United States District Court for the Southern District of Florida is reported at 316 F. Supp. 116. It is reprinted as Appendix A to the Jurisdictional Statement herein, pp. App. 1-8.

Jurisdiction

The decision of the three-judge District Court was filed August 21, 1970. The judgment thereon was entered on October 5, 1970. A notice of appeal therefrom to this Court was filed on October 7, 1970. On February 28, 1971, the Court noted probable jurisdiction.

The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1253.

The Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ."

The Fourteenth Amendment to the United States Constitution provides in part:

> " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (F.S.) 192(06), provides in part as follows:

"192.06 Property exempt from taxation.—The following property shall be exempt from taxation:

* * * * *

"(3) Such property of education, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall be actually occupied and used by them for the purpose for which they have been or may be organized; provided, not more than seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal or charitable purposes of said institutions; provided, further, that nothing in this subsection shall be construed as applying to special assessment by municipalities for sidewalks, curbing, street paving or other local improvements.

"(4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property."

Questions Presented

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church owned commercial enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days and evenings of each week for commercial profit making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

Statement of the Case

This action was brought by the appellants as taxpayers in the State of Florida challenging the validity of F.S. 192(06) as interpreted and applied by the Supreme Court of Florida in *Central Baptist Church of Miami* v. *Dade County,* 216 So. 2d 4 (1968). In that case, the Court held that the statute exempted from real estate taxation the parking lot adjacent to the church and located on its property which was used on Sundays for free parking by those attending services but was operated at other times as a commercial lot for the general public in downtown Miami. The Florida court held also that the exemption did not violate the state constitution since "[t]he record conclusively reflects the church devotes the net income received by it from rentals of the commercial parking lot area to religious and educational purposes." (The decision is reprinted at pp. App. 11-20 of the Jurisdictional Statement herein.)

Following this decision, the present action was brought under Sections 1331, 1343, 2201 and 2202 of Title 28 and Section 1983 of Title 42 of the United States Code. A three-judge court was convened and the case was submitted on stipulated facts and the plaintiffs' motion for summary judgment. The District Court delayed decision pending determination by this Court of the case of *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970). Thereafter, the District Court handed down its decision that under *Walz* a state may "constitutionally construe its religious exemption statute to include church-owned property when the proceeds go solely to church projects," and held accordingly "that F.S. 192.06(4) constitutionally encompasses the 59% of the Central Baptist Church's property utilized six days a week as a commercial parking lot." (Jurisdictional Statement, pp. App. 6-7.)

Summary of Argument

The District Court erred in construing *Walz* to require a holding that under the Establishment Clause a state may exempt from taxation church-owned land used for non-religious profit-making purposes so long as the profits are applied exclusively to the church's religious activities. The presumption of constitutionality arising from long-standing and universal acceptance in the case of exemption of property used exclusively for religious purposes does not extend to property used commercially even though the profits are used for religious purposes. More importantly, excessive entanglement in church affairs, avoidance of which was the basis of *Walz,* is not involved in taxation of commercial enterprises owned by churches.

In the absence of these countervailing factors, the Court should judge the constitutionality of tax exemption of church-owned commercial enterprises by the standards set forth in *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and its progeny and *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) and its progeny. Measured by these standards, the statutory exemption cannot stand, for it constitutes forbidden aid to religion under the *Everson* principle and has as its purpose and primary effect the advancement of religion within the meaning of the *Schempp* test.

While the plaintiffs herein are not commercial parking lot operators and therefore may not have the requisite standing to assert the Equal Protection Clause of the Fourteenth Amendment, the Court in applying the Establishment Clause may and should consider the tensions and conflict necessarily resulting from state-accorded advantages to churches in their competition with private commercial enterprises, a factor not present where church-owned property is used exclusively for religious purposes and hence not in competition with commercial enterprises.

ARGUMENT

I.

Walz does not require a determination that the Establishment Clause of the First Amendment allows tax exemption of church-owned property used as a profit-making commercial enterprise if the profits are used for religious purposes.

A. *The Holding in* Walz

In *Walz,* the Court upheld the constitutionality of a New York statute exempting from taxation land and buildings owned by churches and used exclusively for religious purposes. The District Court deemed itself bound by that decision, and indeed in both the majority opinion of Judge Dyer and the concurring opinion of Judge Eaton expressed the view that a statute such as the one involved in the present suit is less vulnerable to constitutional challenge under the Establishment Clause than the New York statute. In its opinion, the majority said (Jurisdictional Statement, pp. App. 5-6):

> *Walz* makes no attempt to define what kinds of property may or may not be encompassed by an exemption scheme except to say that property used solely for worship can be included. On oral argument in *Walz* plaintiff's counsel stated that he was attacking tax exemptions only as applied to "property used exclusively for religious purposes" and not other property, such as schools or hospitals operated by religious institutions, because it was only the exemption to the *worshipping activity* (and not to other church activities) which he contended created an establishment of religion. See 38 LW 3189. Viewed in this light, it is clear that the

limitation in the *Walz* opinion to property used exclusively for religious worship was merely a mechanism to put the case in the posture of dealing with the *ultimate* religious activity and the Supreme Court nevertheless held there was no establishment of religion and no inhibition on the free exercise thereof. *A fortiori*, a use of church property for slightly *less* religious purposes [the parking lot proceeds go to the church's educational and charitable activities as well as to its religious activities] does not create an establishment of religion and does not inhibit the free exercise of religion. * * * (Emphasis in original.)

In his concurring opinion, Judge Eaton stated (p. App. 8):

> If tax exemption granted on property used *solely for religious worship* does not constitute an establishment of religion or effect a prohibition of the free exercise thereof, then a tax exemption granted on property used as a profit-making parking lot does not. (Emphasis in original.)

We believe the District Court was in error in so interpreting *Walz*. There is a vast difference between tax exemption for property used partly for religious and partly for educational and charitable purposes on the one hand and property used partly for religious and partly for commercial purposes on the other. The Court in *Walz* noted the difficulties that would arise should church exemption be limited to social welfare operations. The Court said (397 U.S. at 674):

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that

some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Obviously, these considerations do not apply to commercial operations. Moreover, there are at least two other reasons why the Court could rule constitutional tax exemption of property used exclusively for religious (or religious and other non-profit) purposes without necessarily being required to uphold exemption of church-owned property used for profit-making commercial purposes: first, the inference of constitutional validity from the long-time and ubiquitous acceptance of the former does not hold true in respect to the latter, and second, the excessive state entanglement in church affairs which might accompany the former would not be present in the case of the latter.

B. *The Presumption of Constitutionality From Acceptability*

In *Walz,* both the Court's opinion by the Chief Justice (397 U.S. at 676-678) and the concurring opinion of Mr. Justice Brennan (at 681-687), stressed that tax exemption for churches went back to the earliest days of the Republic; both recounted its history in considerable detail; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic," and his statement in *Jackman* v. *Rosenbaum Co.,* 260 U.S. 22, 31 (1922) that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it * * * "; and both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption for church property, the Court held, is strong if not conclusive evidence of its constitutionality.

But this ancient and ubiquitous acceptance relates only to church property used for church purposes. In respect to church property used for profit-making commercial purposes, history and practice point in exactly the opposite direction. Implicit in acceptability of church ownership of property used for worship was a recognition that the amount of such property withdrawn from the tax rolls would necessarily be limited and moderate in quantity; there is after all only so much space that can be used for worship. Unlimited, however, is the amount that can be acquired and used for profit-making purposes as commercial enterprises.

Opposition to church acquisition of properties not needed for worship has a history and universality which at least matches exemption from taxation of properties which are needed for worship. The various mortmain statutes dating from medieval England, particularly *De Viris Religiosis* (Stat. 7 Edw. I. 13-1279) testify to this. F. Pollock and F. Maitland, *The History of English Law,* vol. 1, pp. 333-334 (1898).[1] Opposition was based in large measure not only on the inalienability of the property but also on its withdrawal from the sources on which the secular state relied for financial and other contributions needed to maintain it.

Indicative of the truism that there is very little new under the sun and of the fact that the contemporary "sale and lease-back" operation to avoid taxation (see D. Robertson, *Should Churches Be Taxed?* 123-132) has ancient forbears is the Charter of 1217 c. 43. This provided that one was not to enfeoff a religious house and then take back the land as tenant of that house. According to Pollock and Maitland (vol. 1, p. 333, footnote 6),

> [t]he mischief to be prevented seems to be this:—Some favoured religious bodies, e.g., the Templars, have royal charters which by general words set free all the lands that they now have, or shall hereafter acquire, from many burdens. A man gives land to such a house, and then becomes that house's tenant, and as such he claims immunity under the charter.

Mortmain statutes are not unknown in the United States (see C. Zollman, *American Church Law,* 164-168 (1933)),

[1] Other mortmain statutes include Henry III. 36; 13 Edw. I. 32; 15 Rich. II. 5; 23 Henry VIII. 10.

but more relevant is the widespread opposition to exemption from taxation of church-owned property used for commercial purposes. See, D. Robertson, *Should Churches Be Taxed? passim* and particularly Chapter VI; R. Drinan, *Religion, the Courts and Public Policy,* 12 (1963). Even the major church groups do not favor such exemption. Thus, in its brief *amicus curiae* in *Walz,* the United States Catholic Conference states (p. 26-27, footnote 8):

> In arguing that houses of religious worship constitutionally may be afforded exemption from State real estate taxation, this *amicus* does not defend exemptions from taxation accorded church properties used or operated for commercial purposes and has so advised Congress and the public. Joint Statement of the National Council of Churches and the United States Catholic Conference, *Hearings on H.R. 13270 (The Tax Reform Act of 1969)* before the Senate Committee on Finance, 91 Cong. 1st Sess. 83 (May 2, 1969) (unofficial print).

The long-standing unacceptability of exemption of church-owned property used for commercial purposes is further manifested by the District of Columbia statute construed by the Court in *Gibbons* v. *District of Columbia,* 116 U.S. 404 (1886), and even more significantly by the fact that from the beginning of state tax exemption laws the overwhelming pattern among the states has been to limit the exemption to property used either exclusively for worship or in some states, incidental thereto, such as parsonages or houses used for retreats. C. Antieu, P. Carroll and T. Burke, *Religion Under the State Constitutions,* chapter 6 (1965). The most recent manifestation of this unacceptability is the Tax Reform Act of 1969 (P.L. 91-172

Sec. 121(a)(1)) which ended the short-lived exemption of the unrelated income-producing operations of churches (Title 26, U.S.C. Sec. 511(a)(2)(A)).

We do not, of course, equate unacceptability, ancient and ubiquitous as it may be, with unconstitutionality. Nor do we even assert that a presumption of unconstitutionality is raised thereby.[2] We suggest only that the strong inference of constitutionality which both the Chief Justice and Mr. Justice Brennan stressed in their opinions in *Walz* is not present in this case and does not protect the statute challenged herein from the searching judicial scrutiny to which all laws infringing upon First Amendment rights are subject.

C. *The Absence of Excessive Entanglement*

The fundamental rationale of *Walz* is that a major purpose of the Establishment Clause is the avoidance as far as possible of state involvement in church affairs. The decision does not deny that tax exemption is an aid to churches, and a substantial one at that, but the Court deemed paramount the countervailing factor that exemption entails less state entanglement in church affairs that does taxation. The Court said (397 U.S. at 674-675):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or

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[2] We note, however, that the question is at least reserved in *Gibbons* v. *District of Columbia*. There the Court said (116 U.S. at 407):

> We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also to add to its beauty and attractiveness, may, *if not used or intended to be used for any other purpose,* be exempt from taxation under these statutes. (Emphasis added.)

supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. *Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government* by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards but that is not this case. * * * (Emphasis added.)

Whatever entanglement may be involved in assessing an *ad valorem* tax on a parking lot used for commercial purposes certainly verges on being *de minimis*. If experience is a trustworthy teacher, we can be reasonably sure that it involves no excessive entanglement in church affairs for, as has been shown, non-exemption of church-owned income-producing commercial property has since the beginning of

exemption been the norm rather than the exception. There are few standards which can be used to assess the value of land and building used exclusively for worship, and hence "direct confrontations and conflicts" between church and state can be expected. This, however, is hardly true in respect to the valuation of a commercial parking lot which happens to be owned by a church. The operation of commercial parking lots is a major business in today's auto-oriented society, and there is no lack of standards that are employed for tax evaluation purposes. Should any state entanglement ensue from evaluation and enforcement, it would be entanglement in the parking lot business, not in church affairs.

As we have noted, Congress has eliminated the exemption from Federal taxation of income from church-owned businesses. Certainly this necessitates considerably more entanglement and "sustained and detailed administrative relationships" than the one-time assessment of the value of land. Yet, can it be suggested that the Tax Reform Act of 1969 is therefore unconstitutional to the extent that it eliminates the exemption?

The crux of the matter is that the major reason for upholding exemption from taxation of property used for religious purposes—the avoidance of excessive state entanglement in church affairs—is absent in the case of church-owned commercial enterprises. The constitutionality of such an exemption can therefore be determined in accordance with well-accepted standards for interpreting and applying the Establishment Clause.

II.

Whether measured by the no-aid test of *Everson* or the purpose-effect test of *Schempp*, tax exemption of church-owned commercial enterprises is constitutionally impermissible under the Establishment Clause.

A. *The* Everson *Test*

In *Everson*, the Court said (330 U.S. at 16) that "Neither a state nor the Federal Government may * * * pass laws which aid one religion, aid all religions, or prefer one religion over another." This principle was reiterated in *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948), *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 493 (1961) and *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968). In *Walz* the Court said that this test was difficult to apply and noted that in Mr. Justice Jackson's view the decision in *Everson* was irreconcilable with the test it pronounced.

Yet, every test under the Establishment Clause is difficult to apply; it requires, as the Court said in *Walz*, walking a "tight rope." (397 U.S. at 672.) And this is no less true of perhaps all constitutional tests. This is evidenced by the many divided decisions under the clear and present danger test announced in *Schenck* v. *United States*, 249 U.S. 47 (1919), and the obscenity test announced in *Roth* v. *United States*, 354 U.S. 546 (1957), to cite but two of many available examples. (In contrast it may be noted that there was only one dissent in *McCollum*, one in *McGowan* and none in *Torcaso*.) But the difficulty of applying a valid test in a borderline case should not deter the Court from applying it in a clearer case, else no test would survive.

The statute providing for bus transportation of children to parochial schools at public expense was upheld in *Everson* because the aid to religion was an incidental by-product of a statute having the secular purpose of protecting children from traffic hazards and because the state's interest in the safety of children outweighed the strictures of the Establishment Clause. (*Cf. Prince* v. *Massachusetts,* 321 U.S. 158 (1944), where the Court reached the same result in a case of tension between the state's interest in the welfare of children as expressed in a child labor law and the mandate of the Free Exercise Clause.) In *McGowan,* the Court again found that the aid to religion was an incidental byproduct of a valid secular statute and that the state's interest in assuring to workers one day rest in seven outweighed possible encroachment on both the Establishment and Free Exercise Clauses. On the other hand, the Court found no sufficiently weighty countervailing interests in *McCollum* (religious instruction in public schools), *Torcaso* (religious test for notaries public), or *Epperson* (anti-evolution statute).

Walz itself, notwithstanding its comment on the no-aid test as stated in *Everson,* does not repudiate that test. It is certainly of some significance that not only the decision but the opinion in *Walz* was concurred in by Mr. Justice Black, the author of the opinions in *Everson, McCollum* and *Torcaso. Walz* did not hold that devoid of countervailing interests aid to religion is constitutional; it held only that excessive state entanglement in church affairs may constitute a sufficiently weighty countervailing interest.

No countervailing interest is to be found in the present case. As we have sought to show, taxation of a church-owned commercial enterprise brings with it no significant

state entanglement in church affairs. Nor is there any apparent countervailing secular interest, or at least none sufficient to justify the patent state aid to religion. Here we have direct governmental aid to religion which, as Mr. Justice Brennan noted in his concurrence in *Walz* (397 U.S. at 690) provides economic assistance to churches which may exceed in value that of a direct subsidy. (See also statement of Mr. Justice Harlan, at p. 699, that "exemptions do not differ from subsidies as an economic matter.")

The "no-aid" principle which we have quoted from *Everson* appeared in the following paragraph (330 U.S. at 16), which was repeated in *McCollum, McGowan* and *Torcaso*:

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added.)

We believe that taxation of commercial enterprises, or indeed other property such as residences owned by non-church individuals or groups, while church owners are exempt, is inconsistent with the statement that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We are of the opinion that neither as a matter of realistic economics nor constitutional law is it significant that the tax dollar of the non-exempt cannot be traced directly or on a one to one to the cost of governmental services accorded to church-owned property.

For these reasons, we submit that the statute challenged herein violates the Establishment Clause as construed and applied in *Everson* and the cases affirming and applying its principles.

B. *The* Schempp *Test*

In *Schempp,* the Court, in invalidating a Bible reading statute under the Establishment Clause, said:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (347 U.S. at 222).

The test was used in *Epperson* (along with the no-aid test) to invalidate an anti-evolution law and in *Board of*

Education v. *Allen,* 392 U.S. 236 (1968), to uphold a law providing free use of publicly owned textbooks by children attending nonpublic schools. In *Walz,* in neither the Court's opinion nor either of the opinions of Mr. Justice Brennan or Mr. Justice Harlan is reliance placed upon application of the *Schempp* test. (*Schempp* is not even cited in the Court's opinion.) This, we believe, is an implicit recognition that standing alone tax exemption for churches could not survive that test, but was upheld only because of the presence of the countervailing factors of long-standing universality and avoidance of excessive entanglement in church affairs. Since these factors, as we have sought to show, are not present in cases involving church-owned commercial enterprises, we submit that the statute challenged herein is unconstitutional under the purpose-effect test of *Schempp.*

In *Walz,* the Court did say (397 U.S. at 672) that "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion * * * ." We suggest respectfully that this statement should be reconsidered. We find it difficult to believe that the advancement of religion is not a major, if not the only, purpose of exemption to churches. It is possible that legislatures, perhaps anticipating the *Walz* rationale, grant exemption only to avoid entanglement in church affairs. This, however, seems hardly likely either historically, in view of the fact that exemption dates from a period when the state was heavily entangled in church affairs, or realistically in contemporaneous society.

The Court in *Walz* distinguished exemption from subsidization—a distinction rejected by both Mr. Justice Harlan and Mr. Justice Douglas; but even if the distinction

is valid, that does not negate the reality that both mean money in the pocket for churches and that the state's generosity in both cases is predicated on the assumption that religion is a good thing and should be helped financially. This, to us, means that the state's purpose is to advance religion, no less than that its purpose in granting exemption to educational and charitable institutions is to advance education and charity.

Irrespective of purpose, however, it would be difficult to deny that the effect of exemption is to advance the cause exempted. In *Walz*, the Court and the concurring Justices carefully avoided doing so. True enough, the Court held that exemption has the effect of avoiding entanglement, but this hardly constitutes a denial that it may also have the effect of advancing religion. As to which is the "primary" effect, we commend to the Court the following statement from the District Court's opinion in *DiCenso* v. *Robinson*, 316 F. Supp. 112 (1970), now before this Court on appeal:

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect", as *Schempp* seems to re-

quire, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

In any event, in the present case the Court is not faced with the task of ranking the legs of a table in order of importance nor of determining which effect of the exemption statute is primary and which secondary. As we have sought to establish, the amount of entanglement in church affairs involved in taxing its commercial enterprises is minimal, so that even if there be a leg marked "avoidance of entanglement" it is too short to reach the floor and hence plays no significant role in upholding the table of church-state separation.

III.

Invalidation of exemption for church-owned commercial enterprises serves the First Amendment purpose of avoiding church-state tensions and conflicts between sacred and secular interests.

If there was any one purpose which the Establishment and Free Exercise Clauses of the First Amendment were designed to achieve it was the avoidance of the bitter church-state conflicts which had bloodied the pages of Old World history for more than fifteen hundred years. *Everson,* the first decision of this Court to explore in depth the historical background of the religion clauses of the First Amendment, emphasized this aspect of the issue, as did the dissenting opinions of Mr. Justice Jackson and Mr. Justice Rutledge. There is hardly an account of the American experiment in church-state separation which does not lay great stress on its important role in avoiding or ameliorating conflicts and tensions between sacred and secular interests.

This concept was most recently expressed in Mr. Justice Harlan's opinion in *Walz*, wherein he said (397 U.S. at 695):

> While these concepts ["neutrality" and "voluntarism"] are at the "core" of the Religion Clauses, they may not suffice by themselves to achieve in all cases the purposes of the First Amendment. As Professor Freund has only recently pointed out in Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion. Thus, as the opinion of THE CHIEF JUSTICE notes, religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against.

The mortmain statutes to which we have referred reflect the tensions between the sacred and the secular as manifested in large scale church acquisition of lands and their withdrawal from the obligations due to the secular state. There can be little doubt that these tensions and the politicization of religion are inevitable concomitants of tax exemption for church owned commercial enterprises. See, D. Robertson, *Should Churches Be Taxed?* (1968); M. Larson and C. Lowell, *The Churches; Their Riches, Revenues and Immunities* (1969); N. Lo Bello, *The Vatican Empire* (1969); A. Balk, "God Is Rich," *Harper's Magazine*, October 1967.

The plaintiffs herein are not commercial parking lot operators and therefore may not technically have the requisite standing to assert the Equal Protection Clause of the Fourteenth Amendment in the narrow sense. Nevertheless, it is, we believe, entirely appropriate for us to suggest that the Court in applying the Establishment Clause may and should consider the tension and conflict necessarily resulting from state-accorded advantages to churches in their competition with private commercial enterprises, a factor not present where church-owned property is used exclusively for religious purposes and hence not in competition with commercial enterprises. Such consideration must lead to the conclusion that the interests sought to be protected by the Religion Clauses of the First Amendment would best be served by denying to churches the substantial competitive advantage of tax exemption in the world of business and industry.

CONCLUSION

For the reasons stated herein, the judgment of the District Court should be reversed.

Respectfully submitted,

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